**DAVID CHONG KET SUI**

**v.**

**DATUK CHAU TET ON (CHAIRMAN AND OFFICE BEARER OF ROYAL SABAH TURF CLUB FOR AND ON BEHALF OF HIMSELF AND THE MANAGEMENT COMMITTEE OF ROYAL SABAH TURF CLUB)**

HIGH COURT, KOTA KINABALU
DATO' SYED AHMAD IDID J.
[CIVIL SUIT NO. K. 52 OF 1992]
23 JUNE 1993

***SOCIETIES: Expulsion of member of club - Whether expulsion was ultra vires the constitution of the club - Whether member afforded reasonable opportunity to be heard - Whether defendants acted in bad faith in expelling plaintiff.***

The plaintiff was a member of the defendant club. The plaintiff was expelled from the club on the grounds that he had caused the publication of two items in two local newspapers which allegedly contained malicious allegations and unjust criticisms against the chairman of the club.

The plaintiff had requested the right to be heard orally to answer the allegations made against him which request was denied and the question that arose was whether the plaintiff had the right to be heard orally and not in writing as the defendant had demanded.

The plaintiff was not present at the meeting of the Disciplinary Sub-Committee which decided to expel him nor were any witnesses called during the inquiry. The question that arose was whether there was "due inquiry" into the alleged misconduct of the plaintiff.

**Held:**

**[1]** Article 24 of the constitution of the club allowed the plaintiff to select the mode of giving his explanation, either orally or in writing. The defendants failure to allow the plaintiff to give his side of the story orally was fatal and against the norms of natural justice.

**[2]** The defendants were required to show that the inquiry was properly conducted and that the expulsion was on good and sufficient grounds. The meeting of the Disciplinary Sub-Committee, which decided to expel the plaintiff, was clearly not an inquiry as the plaintiff was not present.

**[3]** By failing to call witnesses to substantiate the allegations made against the plaintiff, the defendants have violated the principles of natural justice.

**[4]** The decision of the sub-committee was clearly perverse and devoid of plausible justification. There was no clear evidence of misconduct on the part of the plaintiff and no reasonable person could have reached the decision to expel the plaintiff.

*[Plaintiff ordered to be reinstated as a full member of the club].*

**Cases referred to:**

*Russian Commercial & Industrial Bank v. British Bank for Foreign Trade [1921] 2 AC 438* ***(refd)***

*Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.[1987] 1 CLJ 246 / [1987] 2 MLJ 183* ***(refd)***

*Bank Negara Malaysia v. Mohd. Ismail & Ors. [1992] 1 CLJ 627 / [1992] 1 MLJ 400* ***(refd)***

*Bromley London Borough Council v. Greater London Council & Anor. [1983] 1 AC 768* ***(refd)***

*Malayan Banking Bhd. v. Association of Bank Officers, Peninsular Malaysia & Anor. [1988] 1 CLJ 276 / [1988] 3 MLJ 204* ***(refd)***

*Ridge v. Baldwin [1964] AC 40* ***(refd)***

*Sarawak Supply Corpn. v. Wong Ah Suan [1980] MLJ 65* ***(refd)***

*Local Government Board v. Arlidge [1915] AC 120* ***(dist)***

*Najar Singh v. Government of Malaysia & Anor. [1976] 1 MLJ 203 PC* ***(dist)***

*Ketua Pengarah Kastam v. Ho Kwan Seng [1977] 2 MLJ 152* ***(refd)***

*BSS Kanda v. Government of Malaysia [1962] MLJ 169* ***(refd)***

*Dawkins v. Antrobus [1881] L17 Ch. 615* ***(dist)***

*International General Electric Company of New York v. Commissioners of Customs & Excise [1962] Ch. 748* ***(refd)***

*Lady Anne Tennant v. Associated Newspapers Group Ltd. [1979] FSR 298* ***(refd)***

**Legislation referred to:**

Rules of the High Court 1980, O. 14

**Other sources referred to:**

**Supreme Court Practice 1988,** Vol. 1, p. 131

**The Law of Domestic Inquiries and Dismissals,** Pelanduk Publications, p. 71

*For the plaintiff - Clement A. Skinner; M/s. Skinner Lind Robertson Willie Wong & Chin*

*For the defendants - Mary Gomez; M/s. Koy & Williamson*

**JUDGMENT**

**Syed Ahmad Idid J:**
The plaintiff is a member of the defendant Club from 27 June 1988 and was elected to the Management Committee for 1990. He now seeks declarations that the defendants have:

(i) acted *ultra vires* the Constitution;
(ii) conducted themselves in bad faith in connection with the purported expulsion of the plaintiff.

Additionally, the plaintiff claims for an order that he be reinstated as a full member of the Club.

*Order 14 - Summary Judgment:*

As a preliminary point, I asked both Mr. C. Skinner (for the plaintiff) and Miss Mary Gomez for the defendants to submit on whether in such an action, O. 14 summary procedure can be invoked. Both cited the **Supreme Court Practice 1988** at Vol. 1, p. 131 that "there is no reason why O. 14 may not be employed in an action for declaration where the case is clear". The Court has a discretion whether to grant a declaration - *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade* [1921] 2 AC 438. I therefore have to discern whether the application is clear and for this, in line with the various judgments, I have to decide on both the facts and the question of law. See Hashim Yeop A. Sani, SCJ in *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 2 MLJ 183 at Para B, right of p. 184. I shall consciously keep within the directions of Mohamed Azmi, SCJ in *Bank Negara Malaysia v. Mohd. Ismail & Ors.* [1992] 1 MLJ 400 where the Court "must go one step further and determine whether they (the assertion, denial or dispute) are triable".

*Facts:*

The defendant Club holds its General Meeting once every two years, and the meeting in question was held on 20 September 1990. The plaintiff put out a printed manifesto which he called "The New Force in the Royal Sabah Turf Club - Proposals for Improvement" by "Team B".

Two news items appeared in the Chinese newspaper "Sabah Shi Pao" on 13 September 1990 and the "Asia Times" on 15 September 1990 (see exhibits DC-8 and DC-9 respectively).

Within twelve days of the 1990 General Meeting, the Disciplinary Committee of the defendants met and decided on the action against the plaintiff. A letter dated 16 October 1990 from the defendants' Committee was received by the plaintiff on 10 December 1990 and in this letter the Committee had made its findings that the plaintiff had caused the publication of the two items. On 28 December 1990, the plaintiff requested to explain his conduct orally but this was rejected by the defendant.

Then according to learned Counsel, Mr. Skinner, "on 8 January 1991 the plaintiff wrote back to the Committee through his present solicitors" (see DC-6). In this letter the plaintiff again requested for the opportunity to be heard orally AND sought clarification in relation to the charges against him, that is, whether it related to the statements *per se* or that he caused them to be published. "The clarification was requested so that the plaintiff could properly defend himself before the Committee." Instead of giving some leeway or attention to the plaintiff's letter, the Committee then replied by expelling the plaintiff on 25 January 1991. Plaintiff appealed on 12 February 1991.

*Issues:*

(1) Whether the plaintiff had the right to be heard orally (which plaintiff had requested) and not in writing as the defendant had demanded. Or, as learned Counsel for the defendant has put it, whether plaintiff was given all opportunity of being heard in accordance with the Constitution.
(2) Whether there was "due inquiry" into the alleged misconduct of the plaintiff.

*Legal Principles:*

Let me discuss the second issue first. "Due Inquiry" in employment dismissal cases is required by law. See "The Law of Domestic Inquiries and Dismissals", Chapter 3 (Reprint 1993). The effect of non holding (or improper holding) of an Inquiry in these cases is that the Court may receive evidence to show the misconduct. If the Court is then satisfied that the misconduct was actually committed, then the dismissal or termination of service can be confirmed. Here, we deal with expulsion of a member and I am of the view that there must be the initial requirements that defendants must show both that the Inquiry was properly conducted and that the expulsion was on good and sufficient grounds.

From the evidence at Exhibit "1", the Minutes of the Disciplinary Sub-Committee of the Royal Sabah Turf Club held on Tuesday, 2 October, it is clearly borne out that its objective was to investigate "malicious allegations and unjust criticisms against the chairman ..." It appears they had decided on "malicious" and "unjust" to describe what may be put to them. And the Chairman introduced "the discussion on whether any disciplinary action should be taken against the Full Member David Chong ..." (the plaintiff). In fact, reading through the Minutes which learned Counsel for the defendants has kindly provided but to which learned Counsel for the plaintiff objected, the term manifests itself that a decision had been articulated that the plaintiff had "caused to be published. ..." and that "it was unanimously agreed that the press statements ... were false and malicious." The meeting, by a majority, voted to expel the plaintiff. Then the Sub-Committee decided to "afford Encik Chong the opportunity of a written explanation as to why he should not be expelled". Clearly that meeting was not an Inquiry as the plaintiff was not present.

The Court is surprised by the attitude of the defendants when Counsel contended that under Article 25, the Disciplinary Committee was not required to call any evidence or witnesses in conducting the inquiry as the provision empowers it to carry out the Inquiry "as it may consider necessary". How can one inquire if there is no one from whom one can ask questions or query? The defendants decided not to call the reporters nor to interview them. So how could anybody confirm that the plaintiff was the source or originator of the news item much less the guilty party?

While no particular number of witnesses shall in any case be required for the proof of any fact, it is expected, however, that the defendants should call witnesses to offer evidence and elicit the truth. By failing to call witnesses the defendants "have violated the principles of natural justice (p. 71, Law of Domestic Inquiries and Dismissal by Pelanduk Publications). I have considered the judgments in *Bromley London Borough Council v. Greater London Council & Anor*. [1983] 1 AC 768 and *Malayan Banking Bhd. v. Association of Bank Officers, Peninsular Malaysia & Anor*. [1988] 3 MLJ 204.

Looking at the Minutes, and with no supporting evidence, the decision of the Sub-Committee was clearly perverse and devoid of plausible justification. It seems to me that no reasonable persons could have reached it. Put it in another way, here was the new Committee taking action against someone who was their opposition during the election campaign. It could not have been just and it could not have been moral nor sociable under the circumstances. Was it opponent cleansing? In a members Club such as the defendants, shades of opinions must be allowed to exist in the better interest of the majority. Often times the minority has good ideas!

I now refer to the plaintiff's request to be heard orally. Can the defendants' rejection of his request be that envisaged by Lord Morris in *Ridge v. Baldwin* [1964] AC 40 in that a "hearing" need not be "oral"? *Sarawak Supply Corpn. v. Wong Ah Suan* [1980] MLJ 65. Referring to the *Local Government Board v. Arlidge* [1915] AC 120, where the House of Lords held that the Board was not bound to hear the respondent orally, I am of the view that was decided on somewhat different grounds. In *Najar Singh v. Government of Malaysia & Anor*. [1976] 1 MLJ 203 PC - "being heard" meant "heard orally" and this was all that the plaintiff desired. Raja Azlan Shah FJ (as His Majesty then was) in *Ketua Pengarah Kastam v. Ho Kwan Seng* [1977] 2 MLJ 152 held that "the hearing may take many forms ..." What the plaintiff requested for was that which the Constitution allows him, that is "... an opportunity for **oral** or written explanation of his conduct", that is, the misconduct in question. The plaintiff asked to be heard **orally**. Why was it so difficult to enable him to speak? Why did the defendants decline giving him such an opportunity? See Article 24: "... shall allow the member ... oral ..." I am of the opinion the Article allows the plaintiff to select the mode, that is, oral or in writing. This therefore differs from what had been held in *Najar Singh (supra)* and it is pertinent here that the plaintiff should have been given his say at a suitable time, date and venue ... and the matter may have ended there.

I am not, on this score, able to say whether or not the plaintiff could have explained his conduct (or "misconduct" or allegations against him) away but the crucial question is: why were the defendants unwilling to allow the plaintiff to give his side of the story orally? See *BSS Kanda v. Government of Malaysia* [1962] MLJ 169. This is fatal and goes against the norms of natural justice.

It seems to me that the victorious Management Committee were quick on the draw to get rid of the plaintiff who was the only one from Team B to win the election . While it is not improper to enforce discipline, the enforcement must however be properly done. Membership of a Club is a right and an asset and as such it must be jealously guarded and protected. The Court's cannot sit idly by and watch a group of members taking over a club and the assets by unconstitutional means. While some of the facts seem to be similar to those which occurred in *Dawkins v. Antrobus* [1881] L17 Ch. 615, I am unable to follow that decision on two grounds:

(a) in that case, there was proof of the plaintiff's misconduct and he was given the opportunity to be heard but he refused; and
(b) a General Meeting of the Club, in accordance with .the Constitution, passed a resolution to expel the plaintiff whereas in our case to-day both have not been practised.

There is also no clear evidence of misconduct on the part of the plaintiff.

I accordingly order in terms of the plaintiff's claims dated 17 March 1992. The declaration must be final. *International General Electric Company of New York v. Commissioners of Customs & Excise* [1962] Ch. 748. See also *Lady Anne Tennant v. Associated Newspapers Group Ltd.* [1979] FSR 298. I can only urge that both plaintiff and defendants will bury their hatchet and, with common objective of improving the Club, both should be able to contribute and serve well.

I am sorry that my ruling has been delayed due to my recent hospitalization. I hope this has not caused too much problems to Counsel and the parties.

**GOODYEAR MALAYSIA BHD.**

**v.**

**TAN KOK HAI & 2 ORS.**

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[SIVIL SUIT NO. 22-201-90]
20 MARCH 1993

***GUARANTEE: Application for summary judgment - Appeal against decision of SAR - Conflict of evidence on affidavits - Allegation of fraud - Whether proven - Revocation of guarantee - Whether valid - Whether served on plaintiff - Section 83 Contracts Act 1950.***

The plaintiff applied for summary judgment against the defendants based on a letter of guarantee executed by the defendants whereby they jointly and severally agreed to guarantee the payment by a company in respect of goods sold and delivered by the plaintiff to the company.

The defendants claimed that the letter of guarantee was blank when they signed it and that the plaintiff inserted the amount of RM800,000 after the letter of guarantee had been signed. The defendants contended that they had only agreed to guarantee upto the amount of RM100,000 and not as claimed by the plaintiff.

The defendants further contended that upon discovering the fraud they had revoked the letter of guarantee and submitted that by the reason thereof they were not liable for any amount under the said letter of guarantee.

The learned SAR gave judgment for the plaintiff for part of the amount claimed and gave unconditional leave to the defendants to defend the balance of the claim. The plaintiff appealed against the order giving leave to defend part of the claim and the defendants appealed against the whole of the decision.

**Held:**

**[1]** Having examined the affidavits of the defendants, the defence of fraud raised by the defendants was inherently improbable. In any event the principle that the plea of *non est factum* does not work in favour of a person who has shown himself to be negligent was applicable.